No 70-5015

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

~~No. 5798~~

JON RICHARD ARGERSINGER,

Petitioner,

v.

RAYMOND HAMLIN,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the Florida Supreme Court is reported at 236 So.2d 442 (Fla. 1970), and (A. 8).

JURISDICTION

The judgment of the Florida Supreme Court was entered on June 3, 1970. A petition for rehearing was denied on July 7, 1970. A petition for writ of certiorari was filed on

September 1, 1970. Certiorari was granted on February 22, 1971. The jurisdiction of the Court rests on 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the Sixth and Fourteenth Amendments guarantee the right to counsel to an indigent defendant who upon conviction, faces a maximum penalty which does not exceed six months imprisonment and a one thousand dollar ($1,000) fine.

CONSTITUTIONAL PROVISION INVOLVED

Amendment Six—Jury trials for crimes, and procedural rights.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the assistance of counsel for his defense.* (Emphasis added)

Amendment Fourteen, Section 1.

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

JON RICHARD ARGERSINGER was arrested on January 12, 1970, in Leon County, Florida, and charged with the offense of carrying a concealed weapon, an offense carrying a maximum punishment of six months imprisonment or one thousand dollars ($1,000.00) or both.[1] He was arraigned and plead guilty the next day, January 13, 1970, and was sentenced by a judge of the county court to pay a fine of $500 and in default of such payment to be imprisoned in the county jail, Leon County, Florida, for a period of three months. (A. 1, 2, 4, 5)

On January 20, 1970, an original petition for writ of habeas corpus was filed in the Florida Supreme Court, alleging that ARGERSINGER was tried and convicted by the Leon County Court without first having been advised of his right to counsel or that counsel would be appointed for him if he could not afford an attorney. (A. 1, 2)

The Supreme Court of Florida ordered petitioner released on a $500 appearance bond on January 20, 1970, and ordered the State of Florida to show cause why the petition for writ of habeas corpus should not be granted. (A. 3)

There is no dispute regarding the question of whether or not any attempt was made to advise petitioner of his right to counsel. It is clear that no advise as to counsel was given.[2]

On June 3, 1970 the Florida Supreme Court, in a four to three decision, discharged the writ of habeas corpus and remanded ARGERSINGER to the custody of the respondent, HAMLIN. That decision limited the right to counsel in non-felony cases in the State of Florida to misdemeanors which carry a maximum punishment in excess of six months imprisonment. Since the maximum penalty which ARGER-

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[1] Fla. St. §790.01(1) (1969).

[2] The lower court record consisted of Commitment Order of the County Judge, Exhibit A, of Response to Writ of Habeas Corpus filed in the Florida Supreme Court January 29, 1970 (A. 7).

SINGER could have received was six months imprisonment and a $1,000 fine, the Supreme Court of Florida held that he was not entitled to counsel under the Sixth and Fourteenth Amendments.

On September 8, 1970, this Court, by order of Mr. Justice Black, allowed the petitioner to remain at liberty upon the posting of bail in the amount of five hundred dollars ($500).

The federal question presented was raised in the original habeas corpus proceeding brought in the Florida Supreme Court. That question, i.e., right to counsel, was the sole contention raised in the petition. The June 3, 1970 decision was based solely and explicitly upon the issue of the right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

SUMMARY OF ARGUMENT

A. The decisions of this Court, from *Powell v. Alabama*,[3] to *Gideon v. Wainwright*,[4] and *In re Gault*,[5] support the proposition that any accused defendant cannot be deprived of his liberty unless he has, or intelligently waives, the assistance of counsel.

While those decisions do not speak directly to the question of counsel in a case involving a maximum penalty of six months or less, they do recognize counsel as being fundamental to due process and an essential element of our adversary system of justice. Moreover, the Sixth and Fourteenth Amendments do not limit the mandate of due process and assistance of counsel only to "serious offenses." Thus whenever a loss of liberty is threatened, the right to counsel must be extended.

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[3] 287 U.S. 45 (1932).

[4] 372 U.S. 335 (1962).

[5] 387 U.S. 1 (1967).

Relying upon *Gideon v. Wainwright*,[6] several state and federal courts have concluded that the right to counsel extends to all who face the possibility of incarceration. *State v. Borst*;[7] *James v. Headley*;[8] and *Patterson v. Purdy*.[9]

B. No sound constitutional theory has been advanced that would justify limiting the right to counsel only to offenses which carry a potential punishment of over six months incarceration. The cases which reach that conclusion do so by erroneously seeking to equate the right to counsel with the right to a jury trial because both guarantees reside in the Sixth Amendment, and by utilizing the standards for compensated counsel set forth in Title 18 U.S.C. §3006A.

The jury trial analogy fails to consider the inherent differences between the two rights, i.e., that fair trials can be had before a judge alone, while the assistance of counsel is a prerequisite to fairness. Moreover, the analogy disregards the decisions of this court which have never limited other Sixth Amendment rights only to "serious offenses."[10]

The attempt to fashion a "petty offense" rule from the Criminal Justice Act, 18 U.S.C. §3006A (as amended) is also without merit. That section provides standards only for the compensation of counsel in the federal system, not for the extent of the constitutional guarantee. The legislative history of the act in fact supports the conclusion that petty offenses are within the guarantee of counsel.

C. The failure to provide counsel for indigent persons charged with "minor offenses," while allowing counsel to those who can afford a lawyer constitutes an invidious discrimination in violation of the Equal Protection Clause of

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[6] *Supra*, n. 4.

[7] 154 N.W.2d 888 (Minn. 1967).

[8] 410 F.2d 325 (1969).

[9] ___F. Supp.___ (S.D. Fla. No. 69-957-Civ-Je, 1970).

[10] *In re Oliver*, 333 U.S. 257 (1948).

the Fourteenth Amendment. *Griffi. v. Illinois*;[11] *Cf. Miranda v. Arizona*.[12] No "compelling interest" exists which justifies the irrational classification created by the failure to provide counsel. *Cf. Shapiro v. Thompson*.[13]

D. The decisions which limit the right to counsel to "serious offenses" do so out of fear that a general extension of counsel would cripple our system of justice. Those decisions envision required counsel for jaywalkers, sidewalk spitters and overtime parkers—a vision which portrays the courts being burdened with long, costly proceedings in what are essentially *de minimus* offenses.

The petitioner submits that this fear bespeaks a lack of faith in the resiliency and imaginetiveness of our system. The vast majority of minor offenses carry no real threat of serious penalty—either jail or heavy fine. Thus reclassification of those offenses to reflect the true nature of the possible punishment would exclude those cases from the category requiring counsel. Other offenses—the victimless crimes—could be reclassified so that they too would reflect either the true potential punishment or possibly even be eliminated from consideration as "crimes." Law students can be utilized to represent persons in minor kinds of cases. Para-legal personnel could fulfill similar functions.

Extending the right to counsel would not create chaos, it would create a speedier, more just and equitable court system.

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[11] 351 U.S. 12 (1956).

[12] 384 U.S. 436 at 472-473 (1966).

[13] 394 U.S. 618, 638 (1969).

ARGUMENT

THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION REQUIRE THAT EVERY PERSON FACING INCARCERATION FOR THE COMMISSION OF AN OFFENSE, NO MATTER WHAT ITS DESIGNATION, IS ENTITLED TO BE ADVISED OF HIS RIGHT TO COUNSEL AND IN THE CASE OF AN INDIGENT HAVE COUNSEL APPOINTED TO HIM.

A. The Cases Decided by This Court; By Various Federal Courts and by Various State Appellate Courts Compel the Conclusion that the Petitioner Should Have Been Afforded the Right to Counsel.

1. *Gideon v. Wainwright.*[14]

Any examination of the right to counsel must begin with *Gideon v. Wainwright.*[15] In *Gideon* this Court held that a defendant, charged with a felony, could not be assured a fair trial unless counsel was provided for him. The opinion was written in language that recognized the essential nature of counsel:

> In our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.[16]

The decision in *Gideon* drew its strength from earlier cases which regarded the right to counsel as "fundamental." *Powell v. Alabama,*[17] *Johnson v. Zerbst.*[18]

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[14] *Supra,* n. 4.

[15] *Supra,* n. 4.

[16] 373 U.S. at 344.

[17] 287 U.S. at 68 (1932). The historical background of the right to counsel is explored at 287 U.S. 60-65. At common law a right to counsel existed for misdemeanors and civil matters, but not for felonies. Of interest is the fact that Florida, prior to *Gideon*, and to the present, has always provided for counsel in eminent domain proceedings by constitutionally guaranteeing reasonable attorney fees to the landowner's lawyer. See, Fla. St. §§ 73.11, 73.16 and 74.10.

[18] 304 U.S. 458, 462 (1938).

Gideon gave birth to later holdings which extended the right to counsel to an individual suspect subjected to pre-repetitious interrogation, *Massiah v. United States*;[19] to the suspected offender, *Escobedo v. Illinois*;[20] to the in-custody suspect, *Miranda v. Arizona*;[21] to probation revocations, *Mempa v. Rhay*;[22] to juveniles, *In re Gault*;[23] to lineups, *U.S. v. Wade*,[24] *Gilbert v. California*;[25] to preliminary hearings, *Coleman v. Alabama*.[26]

Thus counsel, or at least the right to counsel, has become the *sine qua non* of fairness at every stage of a felony proceeding in order to protect the integrity of the fact finding process of trial. No constitutional theory justifies limiting that protection to "serious offenses."

The Constitution does not condition its guarantees upon the number of days a person may spend in jail.

The Fourteenth Amendment states in part ". . . Nor shall any state deprive any person of life, liberty or property, without due process of law . . . ." "The fundamental requisite of due process of law is the opportunity to be heard," *Grannis v. Ordean*.[27] Mr. Justice Sutherland wrote in *Powell v. Alabama*: "The right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel."[28]

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[19] 377 U.S. 200, 205 (1964).

[20] 378 U.S. 478, 487 (1964).

[21] 384 U.S. 436, 472-473 (1966).

[22] 389 U.S. 128, 134 (1967).

[23] 387 U.S. 1 (1967).

[24] 388 U.S. 218 (1967).

[25] 388 U.S. 263 (1967).

[26] 399 U.S. 1 (1970).

[27] 234 U.S. 385, 394 (1914).

[28] 287 U.S. at 68-69.

The decisions of this court lead inexorably to the conclusion that depriving a man of his liberty without affording him a right to a lawyer is violative of the Sixth and Fourteenth Amendments. It is a conclusion which other courts have already drawn from *Gideon* and its progeny.

2. *The Federal Cases Extending Gideon.*

Nearly thirty years ago the United States Court of Appeals for the District of Columbia faced the question of whether the right to counsel applied only to "serious offenses." *Evans v. Rives.*[29] The Court unanimously responded:

> Insofar as the right to the assistance of counsel is concerned, the Constitution draws no distinction between loss of liberty for a short period and such loss for a long one.[30]

The Fifth Circuit has held that the right to counsel applied to a defendant charged with a misdemeanor carrying 90 days and a $500 fine, *Harvey v. Mississippi;*[31] to two traffic offenses punishable by a total of 90 days and a $750 fine, *Bohr v. Purdy;*[32] to municipal court defendants facing 90 days or a $500 fine, *Wooley v. Consolidated City of Jacksonville.*[33]

In *James v. Headley,*[34] the Court reversed a district court decision which would have limited the right to counsel only to "serious offenses" i.e., those carrying a penalty in excess of six months. The decision was based on *Harvey v. Mississippi.*[35] Judge Wisdom went further:

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[29] 126 F.2d 633 (D.C. Cir. 1942).

[30] 126 F.2d at 638.

[31] 340 F.2d 263 (5th Cir. 1965).

[32] 412 F.2d 324 (5th Cir. 1969).

[33] 433 F.2d 980 (5th Cir. 1970).

[34] 410 F.2d 325 (5th Cir. 1969).

[35] *Supra,* n. 31, At least 250 Florida court convictions for "minor offenses" have been set aside by the United States District Courts for the Middle and Southern Districts of Florida in the past two years, based on the *Harvey* line of decisions. See, William A. McRae, Jr.,

> I start with the general principle that the Sixth Amendment establishes the right to counsel in *all* criminal prosecutions. There is no distinction between felonies and misdemeanors, between gross and petty offenses, between the loss of liberty for 181 days and the loss of liberty for 180 or fewer days.[36]

Although voicing concern over the impact of affording counsel to *de minimus* offenses, Judge Wisdom wrote:

> I take the position that regardless of labels, an offense is serious enough to require appointment of counsel if it may result in a loss of liberty for any period of time.[37]

In *Patterson v. Purdy*,[38] the Court decided that a woman convicted of a traffic offense carrying a possible 30 day sentence was entitled to be advised of her right to counsel no matter the number of days she could have received.

Except for *Brinson v. Florida*[39] and its offspring, *Wall v. Purdy*[40] and a footnote in *Beck v. Winters*,[41] lower courts have concluded that the Sixth and Fourteenth Amendments mean what they say—the right to counsel lives, even in the low visibility of the criminal process.

The Administration of Justice in the Federal District Courts, 23 U. Fla. L. Rev. No. 2, at Appendix P. (to be published, May 1971). See also, *Bramlett v. Peterson*, 307 F. Supp. 1311 (M.D. Fla. 1969) where Justice of the Peace Courts in Volusia County, Florida were enjoined from trying misdemeanors without first advising them of their right to counsel and see, *Phillips v. Cole*, 298 F. Supp. 1049 (N.D. Miss. 1968) where a similar injunction was entered.

[36] 410 F.2d at 334. (Emphasis in original).

[37] 410 F.2d at 334.

[38] ___F. Supp.___ (S.D. Fla. No. 69-975-Civ-Je, 1970).

[39] 273 F. Supp. 840 (S.D. Fla. 1967).

[40] 321 F. Supp. 367 (S.D. Fla. 1970).

[41] 407 F.2d 125, 130 & n. 13 (8th Cir. 1969).

3. *The State cases extending Gideon.*

The trend of recent decisions has been towards recognizing the right to counsel in misdemeanors. It is very difficult to make any comparison because of the differences between state laws. In addition, there is a great deal of difference between the application of even similar laws in the states. Then there are conflicts within states, and between the existing state law and the Federally administered law within a given state. And the federal law itself is conflicting.

The states can be broken down into three groups as to the application of *Gideon*:[42] those that only appoint counsel for felonies,[43] those that appoint counsel for felonies and "serious crimes"[44] and those which appoint counsel for all or most misdemeanors.[45]

ALABAMA

Before *Gideon* in Alabama, counsel was only appointed in capital cases.[46] In applying *Gideon*, Alabama has followed the "serious crime" doctrine.[47] This is because of the word-

[42] Two articles were of great help in the computation of the various states: Decker and Lorigan, *Right to Counsel: the Impact of Gideon v. Wainright in the 50 States*, 3 Creighton L. Rev. 103 (1970); Phelfs, Senior Research Project, Northwestern University School of Law (1971, Unpublished).

[43] Alaska, Arkansas, Kansas, Kentucky, Louisiana, Maine, Mississippi, Montana, Nebraska, Ohio, Rhode Island, Tennessee, Virginia, Washington.

[44] Alabama, Arizona, Florida, Idaho, Maryland, Missouri, Nevada, New Mexico, North Carolina, South Carolina (although questionable), Utah, Wisconsin.

[45] California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana (but only as to large counties), Iowa, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Vermont, West Virginia, Wyoming.

[46] Ala. Code Title 15, § 318 (1958).

[47] *Irvin v. State*, 44 Ala. App. 101, 203 So.2d 283 (1967).

ing of their statute which covers only "serious crimes" and not because of any constitutional grounds. The State Supreme Court in *Irvin v. State*[48] pointed out a number of factors that should be considered by a court in determining if a "serious crime" has been committed, but did not draw any concrete lines as to the limits. The trial judge must determine in each case, by considering the circumstances of the case, whether or not counsel should be appointed. Alabama is in the Fifth Circuit but, there do not seem to be any significant Federal cases which have applied the 5th Circuit Rule to Alabama.

ALASKA

Prior to *Gideon*, Alaska only recognized the right to counsel as to felons.[49] The Alaskan Rules of Criminal Procedure[50] presently state that upon appropriate request, a defendant who is unable financially to afford counsel will be appointed counsel by the court.[51] However, the Magistrate's Criminal Rules specifically makes this provision inapplicable in the lower courts.[52] Therefore, only misdemeanors which are tried in the Superior Court are afforded the right.

The Alaska Supreme Court recently rejected the "petty offense" standard for jury trials.[53] Some have taken the dicta, in reference to right of counsel in the case, as an indication that the court would rule the same on that point as well.[54] A closer reading of the court's opinion would not necessarily lead to such a conclusion.

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[48] *Id.*

[49] Alaska R. of Crim. P. 39 (b) (1963).

[50] Alaska R. of Crim. P. 39 (b) (Supp. 1968).

[51] Alaska R. of Crim. P. 39 (c) (Supp. 1968).

[52] Alaska Mag. Crim. R. 1(j) (Supp. 1968).

[53] *Baker v. City of Fairfax*, 471 P.2d 386 (Alas. 1970).

[54] *Id.* at 395.

ARIZONA

In 1964 the Arizona Supreme Court announced that counsel was required in "serious misdemeanors" and left to the trial judges the determination of a "serious misdemeanor."[55] Then *Burrage v. Superior Court*[56] was concluded and the court further defined their prior holding. The *Burrage* case dealt with defendants who were charged with crimes where the maximum punishment was five months in jail or $500, or both. The court ruled that "a reasonable interpretation of the Constitution (U.S.) does not require that there be legal representation for all misdemeanors."[57] The court also looked to the Federal Rules and stated that lawyers are required for all except "petty offenses" which they define as those where the penalty may exceed six months or a fine of $500.[58] At this point the court went on to hold:

> . . . counsel for indigent misdemeanants must be provided in all cases where the maximum punishment exceeds $500 in fines or six months imprisonment, or both, and may be provided if the trial court in its discretion believes that the complexity of the case is such that the ends of justice require legal representation.[59]

Thus Arizona is a state with a six-month rule, based upon the Federal Rules.

ARKANSAS

The *Beck v. Winters*[60] case which became the 8th Circuit Rule came from this state. This case has often been cited

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[55] *State v. Anderson*, 96 Ariz. 123, 392 P.2d 784 (1964).

[56] 105 Ariz. 53, 459 P.2d 314 (1969).

[57] *Id.* at 315.

[58] 18 U.S.C. § 3006 A.

[59] *Burrage v. Superior Court, supra*, n. 56, at p. 315.

[60] 239 Ark. 1151, 394 S.W.2d 364 (1965), cert. den. 385 U.S. 907 (1966); *See also* 407 F.2d 125 (8th Cir. 1969).

as an indication that this Court feels that the right should not be extended to misdemeanors. However, the case did not stop with the denial of *certiorari* by this Court from the Supreme Court of Arkansas. That court had denied the right to counsel in misdemeanors.[61] The case continued confusing matters when action was filed in the federal court system and the right to counsel was granted by the lower federal court and upheld by the 8th Circuit.[62] This case then was once again appealed to this Court, which denied *certiorari* for the second time. The only thing that can be positively concluded about *Beck v. Winters* is that in Arkansas the state courts are still enforcing *Beck v. Winters* (the state proceeding),[63] and thus only providing counsel for indigents "about to be arraigned upon an indictment for a felony;"[64] while at the same time the federal courts of the same state follow *Beck v. Winters* (8th Circuit proceeding) which held there was a right to counsel in at least some misdemeanors.[65]

CALIFORNIA

The California Supreme Court held in *In re Johnson*[66] that the right to counsel covers all misdemeanors, including municipal and other lower courts, even traffic violations.[67]

COLORADO

Colorado has a Public Defender system, and they are required by statute[68] to represent indigents charged with municipal ordinance violations.

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[61] *Id.*

[62] *Beck v. Winters*, 407 F.2d 125 (8th Cir. 1969).

[63] Also see *Cabeleon v. State*, 243 Ark. 351, 420 S.W.2d 534 (1967).

[64] Ark. Stat. Ann. §43-1203 (repl. 1964).

[65] *Supra*, n. 41.

[66] 62 Cal.2d 325, 398 P.2d 420 (1965).

[67] *Blak v. Municipal Court*, 242 Cal. App.2d 857, 51 Cal. Rptr. 771 (1966).

[68] Col. Rev. Stat. Ann. §39-21-3 (1969 Supp.).

CONNECTICUT

In the case of *State v. Simmonds,*[69] the court held that the right to counsel applies to misdemeanors (the defendant there was charged with the breach of the peace) and requires a knowing waiver of the right.

DELAWARE

The Rules of the Justice of the Peace Courts of this State require the appointment of counsel "if the defendant desires counsel and is unable to obtain counsel."[70]

FLORIDA

The state courts in Florida, up until *Argersinger v. Hamlin*[71] had adhered to the felony rule,[72] but held in *Argersinger* that counsel must be provided where the potential penalty exceeds six months imprisonment, and notice must be given. The federal courts in Florida follow the 5th Circuit Rule and this lead to a great deal of confusion.[73] In practice some lower state courts and municipal courts provide the right and others do not.[74]

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[69] 5 Conn. Cir. 178, 247 A.2d 502 (1968).

[70] Rule 26, Del. Justice of the Peace Crim. Rules.

[71] 236 So.2d 442 (Fla. 1970).

[72] *Fish v. State,* 159 So.2d 866 (Fla. 1964), *Watkins v. Morris,* 179 So.2d 348 (Fla. 1965), *State ex rel. Taylor v. Warden of Orange County Prison Farm,* 193 So.2d 606 (Fla. 1967).

[73] *Harvey v. Mississippi,* 340 F.2d 263 (5th Cir. 1965), also see *Boyer v. City of Orlando,* 402 F.2d 966 (5th Cir. 1968), *MacDonald v. Moore,* 353 F.2d 106 (5th Cir. 1965), *James v. Headley,* 410 F.2d 325 (5th Cir. 1965), and *Bohr v. Purdy,* 412 F.2d 321 (5th Cir. 1969).

[74] In Miami Beach, counsel is provided for all misdemeanors and in Tampa some Municipal Judges give notice of the right and other judges do not. In Tallahassee the right is not practiced (Information from personal experience of Petitioner's counsel).

GEORGIA

By statute in Georgia, counsel is appointed in felony cases[75] but the courts in Georgia have held that the right does extend to misdemeanors and has implied it might extend to ordinance violations.[76] The same court also stated in dictum that the right was not absolute as to misdemeanors.[77] However, the right does not seem to be evenly administered in Georgia.[78]

HAWAII

The State Constitution requires appointment of counsel in indigent cases where the accused could receive a sentence of imprisonment for more than sixty days.[79]

IDAHO

By statute in Idaho, "needy persons are required to be represented by counsel, if they are charged with a serious crime."[80] "Serious crimes" are defined as felonies or misdemeanors for which the penalty includes confinement for more than six months or a fine of $300.[81]

ILLINOIS

By statute in Illinois, if the defendant is indigent and desires counsel, in all cases, except where there is only a fine, the public defender is appointed.[82] But in one confusing case it was held that the courts do not have to inform the defendant of his right to counsel.[83]

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[75] Ga. Code Ann. §27-3001.

[76] *Taylor v. City of Griffin*, 113 Ga. App. 589, 149 S.E.2d 177 (1966), *cert. den.* 385 U.S. 1016 (1967).

[77] *Id.*, 149 S.E.2d at 178.

[78] See *Shephard v. Jordan*, 425 F.2d 1174 (5th Cir. 1967).

[79] Hawaii St. Const. (1968), Art. I, §11.

[80] Idaho Code Ann., §19-852 (1969 Supp).

[81] Idaho Code Ann., §19-851 (1969 Supp).

[82] Ill. Ann. Stat. Ch. 38 §133 (Supp. 1971).

[83] *People v. Dupree*, 42 Ill.2d 249, 246 N.E.2d 281 (1969).

INDIANA

The law pertaining to right to counsel in this state is difficult to understand. The case law requires the right of counsel in misdemeanors as far back as 1951,[84] but this was never widely followed. Then the state enacted a public defender program for the large counties. This act was later extended[85] but it does not seem to have changed the fact that the right to counsel is practiced only in the large counties.

IOWA

The State Supreme Court held last year that counsel must be appointed for indigents accused of any indictable offense (punishable by imprisonment for more than thirty days) and the defendant must be advised of his rights.[86] This holding was based upon a state statute.[87] Although the Sixth and Fourteenth Amendment arguments were raised, the court ruled it was not basing the decision on them specifically.[88]

KANSAS

Kansas only appoints counsel and recognizes the right to counsel as to felonies.[89]

KENTUCKY

The Kentucky Rules of Criminal Procedure require the appointment of counsel before arraignment in cases where the defendant is charged with a crime for which the punishment is a fine of more than $500, or confinement for more than twelve months, or confinement in the penitentiary.[90]

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[84] *Bolkovac v. State*, 229 Ind. 294, 98 N.E.2d 250 (1951); also see *Speight v. State*, 239 Ind. 157, 155 N.E.2d 752 (1959).

[85] Ind. Ann. Stat. §9-3501 (Supp. 1971).

[86] *Wright v. Denato*, 178 N.W.2d 339 (Iowa 1970).

[87] Iowa Code Ann., §775.4 and .8.

[88] *Supra*, note 86.

[89] Kan. Gen. Stat. Ann. §22-4503 (1970 Supp.).

[90] Ky. Crim. Pro. Rule 8.04.

The Rule states that the appointed counsel should represent the defendant in all future stages of the proceeding and it would seem to include all aspects of appeals as well as the trial.[91]

LOUISIANA

Louisiana statutes require the appointment of counsel only in felony cases.[92] The state court decisions have not extended the right any further,[93] but Louisiana's federal courts, like Florida's and other state's, have extended the right thus leaving a conflict.[94]

MAINE

The Maine courts are required to inform defendants of their right to counsel, but the appointment is not so clear.[95] All defendants charged with felonies are required to be advised of their right to counsel at the beginning of any proceeding, and be provided counsel if indigent,[96] but in misdemeanor cases the court "may" appoint counsel.[97]

MARYLAND

At all stages of court proceedings the accused must be informed of his right to counsel[98] and provided counsel if the offense carries a penalty of imprisonment for 6 months or more or a fine of $500 or both.[99] The court may also

[91] *Id.*

[92] La. Rev. Stat. Titl. 15, Art. 141 (F).

[93] *State v. Rockeymore*, 253 La. 101, 216 So.2d 828 (1968) (indigency was not a factor); *State v. Angelo*, 251 La. 250, 203 So.2d 710 (1967) (indigency was not a factor); *Cortincz v. Flournoy*, 249 La. 714, 190 So.2d 909, cert. den. 385 U.S. 925 (1966).

[94] *Petition of Thomas*, 261 F. Supp. 263 (W.D. La. 1966) Aff'd sub. nom., *Goslin v. Thomas*, 400 F.2d 594 (5th Cir. 1968).

[95] Me. Rev. Stat. Ann. Title 15 §810, Compare Me. R. Crim. P. 44.

[96] Me. R. Crim. P. 44.

[97] *Id.*

[98] Md. Rule 719 (b) 1.

[99] Md. Rule 719 (b) 2(a).

assign counsel in any other case where the complexity of the case, the youth, inexperience or mental ability of the accused warrant it.[100] In addition, the Maryland rules provide that if an accused is indigent he may request the assistance of counsel himself.[101]

MASSACHUSETTS

The Supreme Court held in *MacDonnel v. Commonwealth*[102] that the court rules[103] of the state required advice of counsel in minor misdemeanor cases, but that there would be "proceedural problems" as to the bar in attempting to extend the right of counsel to all of these cases.[104] However, the test of *MacDonnel* is a possibility of imprisonment and if this exists, counsel must be appointed.

MICHIGAN

Michigan has followed the "three month rule." If the charge facing a defendant is punishable by more than 3 months in jail and the person is indigent, he is entitled to counsel and must be informed of his right.[105] Although a defendant charged with a crime having a lesser penalty is not entitled to counsel at the trial level, he is afforded the right on appeal.[106] The "three month rule" seems to be a line that has been arbitrarily drawn because of the jurisdiction of the Justice of the Peace Courts, which in Michigan have jurisdiction up to this point, and not because of any constitutional grounds.[107]

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[100] See *Manning v. State*, 237 Md. 349, 206 A.2d 563 (1965).

[101] Md. Rule 719 (b) 3.

[102] 230 N.E.2d 821 (Mass. 1967).

[103] Mass. Sup. Jud. Ct. Rule 3:10.

[104] *Supra*, n. 102 at p. 823.

[105] *People v. Mallory*, 378 Mich. 538, 147 N.W.2d 66 (1967).

[106] *Id.* and *People v. Lewis*, 15 Mich. App. 225, 166 N.W. 2d 491 (1968).

[107] Mich. Comp. L. §775.16.

MINNESOTA

Minnesota is the leading state following the rule expounded by the petitioner here. A defendant faced with a possibility of incarceration has the right to counsel and if it is determined (that he is) an indigent, he must be appointed counsel. The Minnesota Supreme Court ruled in 1967 that counsel must be appointed to represent an indigent defendant if the offense he was charged with could result, upon conviction, in incarceration.[108] The court there pointed to *Gideon* for the basis of its ruling,[109] and stated that ". . . to insure the fair administration of justice, we decided that counsel should be provided in any case, whether it be a misdemeanor or not, which may lead to incarceration in a penal institution."[110]

MISSISSIPPI

By statute in Mississippi the courts are required to appoint counsel in all capital cases, and may appoint counsel in felony cases less than capital cases.[111] However the case law has required appointment in all felonies based upon *Gideon*.[112] Mississippi is also the home of the "90-day rule," resulting from the decision of the 5th Circuit in *Harvey v. Mississippi*[113] thus making a conflict in the federal and state law in Mississippi.

MISSOURI

By statute and rules in Missouri, counsel must be afforded anyone arraigned for a felony.[114] However, an Attorney

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[108] *State v. Borst*, 278 Minn. 388, 154 N.W.2d 888 (1967).

[109] *Id.* at p. 894.

[110] *Id.*

[111] Miss. Code Ann. § 2505 (1967 Supp.).

[112] *Conn v. State*, 251 M. 488, 170 So.2d 20 (1964).

[113] 340 F.2d 263 (5th Cir., 1965).

[114] Mo. Rev. Stat. §545.820, and Mo. R. Crim. P. 29.01.

General's opinion has stated that counsel may be appointed in Magistrate Court, and all coming before that Court should be advised of their right to appear by counsel. The same opinion also rules that counsel must be appointed in all misdemeanor cases ". . . of more than minor significance and in a case where prejudice might result."[115] The state rule is therefore in conflict with that set out by the 8th Circuit.[116]

MONTANA

By statute in Montana, counsel must be appointed anyone charged with a felony[117] and this includes all appeals as well.[118] But the practice is to appoint counsel for some misdemeanors as well.[119]

NEBRASKA

Nebraska, by statute, requires appointment of counsel for anyone charged with a felony and brought before a magistrate.[120] Here again there is a conflict between the state law and the federal law because Nebraska lies within the 8th Circuit.[121]

NEVADA

In Nevada, persons must be informed of the right to counsel when brought before a magistrate[122] and provided with counsel if indigent and charged with a misdemeanor punishable by more than six months in jail or more than a $500 fine or both.[123]

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[115]Mo. Op. Atty. Gen. No. 207, Young 6-21-63.

[116]See *Beck v. Winters, supra,* n. 60.

[117]Mont. Rev. Code Ann. §95-1001.

[118]Mont. Rev. Code Ann. §95-1003.

[119]36 Mont. L. Rev. 1, at 3 (1964).

[120]Neb. Rev. Stat. Sec. 29-1803 (1967).

[121]See *Beck v. Winters, supra,* n. 60.

[122]Nev. Rev. Stat. 171.370.

[123]Nev. Rev. Stat. Sec. 171.188 and 193.104 (1969).

NEW HAMPSHIRE

By statute in New Hampshire, every defendant charged with a crime where incarceration is a possibility, or a fine of more than $500 may be levied, is entitled to be represented by counsel and be advised of such right.[124]

NEW JERSEY

The New Jersey Revised Rules provide that "every person charged with an indictable offense shall be advised by the court of his right to retain counsel and to have the Office of the Public Defender represent him if he is indigent."[125] The right seems to be an absolute one, because non-indictable offenses are not crimes in New Jersey.

NEW MEXICO

By statute in New Mexico any indigent charged with a "serious crime" which is defined as including any felonies and misdemeanors which carry a possible penalty of imprisonment for more than six months,[126] must be afforded the right to counsel.

NEW YORK

In New York the defendant must be advised of his right to have counsel and if indigent he must be provided counsel, if he so desires,[127] except for traffic offenses.[128]

NORTH CAROLINA

The state court has held that persons charged with crimes punishable by more than six months in jail or more than

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[124] N.H. Rev. Stat. Ann. Sec. 604-A:1, 604-A:2 (1970 Supp.).

[125] N.J. Rules 3:27-1.

[126] N.M. Stat. Ann. §41-22-2 and 3 (Supp. 1969).

[127] *People v. Witenski,* 15 N.Y.2d 392, 207 N.E.2d 358 (1965).

[128] *People v. Lettorio,* 16 N.Y.2d 307, 213 N.E.2d 670, cert. den. 384 U.S. 911 (1965).

$500 fine, and who are indigent, are entitled to counsel and must be so advised.[129]

NORTH DAKOTA

In a recent case the Supreme Court in North Dakota held that the statutes of that state[130] require appointment of counsel for defendants if the charge is criminal in nature whether the offense is a misdemeanor or a felony.[131]

OHIO

Ohio courts have ruled that because of their statutes[132] an accused must be informed as to his right to counsel and this is not limited to felonies. But the same court also ruled that this does not require the appointment of counsel if the accused is indigent, unless it is a felony—therefore limiting the right only to indigent felons.[133]

OKLAHOMA

Even before *Gideon*, Oklahoma had extended the right to counsel to misdemeanors,[134] but the case was not followed in practice. Recently, the state legislature has passed legislation which allows a Public Defender program to be set up for municipalities for indigents charged with municipal ordinance violations. This is an optional program.[135]

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[129] *State v. Morris*, 275 N.C. 50, 165 S.E.2d 245 (1959) also *Bennett v. Hurley*, 315 F. Supp. 1131 (E.D.N.C., 1967); *State v. Green*, 277 N.C. 188, 176 S.E.2d 756 (1970); *State v. Hickman*, ___N.C. App.___, 176 S.E.2d 910 (1970).

[130] N.D. Code 29-07-1.1.

[131] *State v. Heasley*, 180 N.W.2d 242 (N.D. 1970).

[132] Ohio Rev. Code 2937.02.

[133] *City of Toledo v. Frazier*, 10 O. App.2d 51, 226 N.E.2d 777 (1967).

[134] *Hunter v. State*, 288 P.2d 425 (Okla. Crim. 1965).

[135] Okla. Stat. Ann. Tit. 11 Sec. 959.1 and 959.3 (1967-71, Supp.).

OREGON

The Oregon Supreme Court has ruled in an extensive holding that

> . . . no person may be deprived of his liberty who has been denied the assistance of counsel guaranteed by the Sixth Amendment. This holding is applicable to all criminal prosecutions, including prosecutions for violations for municipal ordinances.[136]

PENNSYLVANIA

The Rules of Criminal Procedure of Pennsylvania require appointment of counsel for all indigents charged with indictable offenses.[137] The Rules also provide for the assignment of counsel ". . . whenever the interest of justice requires it." The comments after the Rule point out that this may even be in the case where the defendant is not an indigent.[138] The Rules also provide for counsel on appeal.[139]

RHODE ISLAND

Rhode Island statutes provide that the Public Defender is ". . . to represent and act as attorney for indigent defendants in those cases referred to him by the Supreme Court, and by the Superior Courts."[140] But in practice this means few, if any, indigents charged with misdemeanors are represented by counsel. This is because most misdemeanors are not tried in either of the above mentioned courts, but are within the jurisdiction of the District Courts, thus in practice, counsel is limited to felonies in Rhode Island.[141]

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[136] *Stevenson v. Holzman*, 89 O. 27, 458 P.2d 414 (1969).

[137] Penn. R. Crim. P., Rule 318.

[138] *Id.*

[139] *Id.*

[140] R.I. Gen. Laws Ann. 12-15-3.

[141] Compare, R.I. Gen. Laws Ann. §8-2-15 and §12-3-1.

SOUTH CAROLINA

South Carolina still has on its books a statute that only extends the right of counsel to capital offenses.[142] The case law of the State now extends to non-capital offenses.[143] And in still another case, the Supreme Court of the State confused the issue even further by holding that the right extends to "criminal prosecutions" and implied that this was to include lesser offenses, but the case before them was a felony and the Court did not clarify the Ruling.[144]

SOUTH DAKOTA

State statutes require that counsel be provided in "any criminal action."[145] This state is another state in the 8th Circuit and, thus seems to differ somewhat from that rule.[146]

TENNESSEE

Tennessee is the only state which has moved backwards. At the time of *Gideon*, the State statutes provided for appointment of counsel for ". . . every person accused of any crime or misdemeanor whatsoever."[147] But after *Gideon* the State enacted a new statute which only provides counsel ". . . in all felony cases."[148] Counsel also has been provided for felony appeals as well.[149]

TEXAS

State statutes have been enacted in Texas which would require appointment of an attorney for ". . . an accused

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[142] S.C. Code Ann. § 17-507.

[143] *Pip v. MacDougall*, 245 S.C. 98, 138 S.E.2d 840 (1964).

[144] *State v. Cowart*, 251 S.C. 360, 162 S.E.2d 535 (1968).

[145] S.D. Comp. Laws Ann. Secs. 23-2-1 and 23-2-3 (1970 Supp.).

[146] *Beck v. Winters, supra*, n. 60.

[147] Tenn. Code Ann. § 40-2002 and § 40-2003 (1955).

[148] Tenn. Code Ann. § 40-2017 (Supp. 1970).

[149] Tenn. Code Ann. § 40-2018 (Supp. 1970).

charged with a felony or misdemeanor punishable by imprisonment."[150]

UTAH

Utah, by statute, provides for assignment of counsel when the crime charged could result in ". . . confinement for more than six months in jail or prison."[151]

VERMONT

Vermont requires assignment of counsel ". . . in a criminal proceeding where the person is charged with a crime punishable by imprisonment for more than sixty days or by a fine of more than $1,000."[152] The right applies to appeals, extra-ordinary proceedings, and habeas corpus as well.[153]

VIRGINIA

By statute in Virginia, the right to counsel is only extended to persons who are charged with felonies.[154] But like many other states mentioned before, the state law in Virginia is in conflict with a Federal District Court decision which has recently held that the right extends to misdemeanors.[155]

WASHINGTON

By statute, one accused of a felony is guaranteed the right to counsel in Washington[156] but the State Supreme Court seems to extend the right to misdemeanors in *Tacoma v. Heater*[157] by saying ". . . the *Gideon* case means that every

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[150] Tex. Code Crim. Proc. § 26.04 and *Sallerwhite v. State*, 423 S.W. 592 (Tex. Crim. 1958).

[151] Utah Code Ann. § 77-64-2 (Supp. 1969).

[152] Vt. Stat. Ann. Tit. 13, Sec. 6503 (1970 Supp.).

[153] *Id.*

[154] Va. Code Ann. Sec. 19.1-241.1 (1970 Supp.).

[155] *Marston v. Oliver*, ___F.Supp.___, 8 Crim. L. Rptr. 2457 (E. D. Va. 1971).

[156] Wash. Rev. Code Ann. § 10.01.110 (Supp. 1970).

[157] 67 Wash. 733, 409 P.2d 867 (1966).

defendant has a constitutional right to counsel in all criminal prosecutions."[158] But the court began to vacillate and seems now to be trying to back-step with a very confusing decision in *Hendrix v. City of Seattle*[159] which purports to hold that the right to counsel, though it extends to misdemeanors, does not require the appointment of public counsel if the defendant cannot afford one.[160]

WEST VIRGINIA

In *Moats v. Janco*[161] the West Virginia Supreme Court of Appeals extended the right to counsel to misdemeanants facing incarceration. However, the decision was recently withdrawn,[162] partly because of the granting of certiorari in this case. Thus, the status of counsel in West Virginia awaits the decision of this Court.

WISCONSIN

Because of a lack of specific standards by either their legislature or this Court,[163] the Supreme Court of Wisconsin has used the Federal Criminal Justice Act as a guideline. The right in Wisconsin thus extends to indigents charged with misdemeanors where the potential penalty is more than six months imprisonment.[164]

WYOMING

"Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at

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[158] *Id.* at 869.

[159] 76 Wash. 142, 456 P.2d 696 (1969).

[160] The opinion was by J. Hale with the Chief Justice concurring and three judges concurring in the result only and four judges dissenting.

[161] *Moats v. Janco*, 8 Crim. L. Rept. 2285 (W.Va. 1971).

[162] *Moats v. Janco*, 9 Crim. L. Rept. 2038 (W.Va. 1971).

[163] *State ex rel. Tlutshack v. State Department of Health and Social Services*, 37 Wis.2d 713, 155 N.E.2d 549 (1968).

[164] *Supra*, n. 58.

every stage of the proceedings from his initial appearance before the Commissioner or the Court, through appeal, unless he waives the appointment."[165]

B. The Decisions Which Limit the Guaranty of Counsel to Offenses Which Carry a Possible Punishment of Over Six Months Are Incorrect.

In the decision below, *Argersinger v. Hamlin*,[166] the Florida Supreme Court adopted the "excess of six months" standard advanced in *Brinson v. Florida*.[167]

The Eighth Circuit in *Beck v. Winters*[168] was careful not to formulate a hard and fast rule to determine application of the right to counsel. But it did refer the reader to *Brinson* for direction.

So *Brinson* has emerged as the leading precedent for limiting the right to counsel only to "serious offenses," meaning those which carry more than a six months jail term as punishment. It is interesting to note that in *McDonald v. Moore*[169] the Fifth Circuit anticipated such a theory and found ". . . it would be difficult to sustain on any legal ground." And in reversing the district court opinion in *James v. Headley*,[170] the Fifth Circuit expressly rejected *Brinson*. See *James v. Headley*.[171]

Brinson and the decision on review in this case are based on the following assumptions:

(1) The right to counsel must be equated with the right to a jury trial;

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[165] Wyo. Crim. R. P. Rule 6 (1969 Supp.).

[166] *Supra*, n. 71.

[167] *Surpa*, n. 39.

[168] *Supra*, n. 60.

[169] 353 F.2d 106 at 109, n. 4 (5th Cir. 1965).

[170] 281 F. Supp. 588 (S.D. Fla. 1968).

[171] *Supra*, n. 8.

(2) Since both guarantees reside in the Sixth Amendment, the same standards must apply to both, and;

(3) The Federal Petty Offense Standard in 18 U.S.C. Section 1 and the Criminal Justice Act of 1964[172] limit the right to counsel to serious offenses in the federal system, thus the same result must be obtained in the state system.

Each of these points is without merit and is discussed below.

1. *The Right to Counsel Cannot Be Equated With the Right to a Jury Trial.*

Throughout the right to counsel decisions in *Gideon,*[173] *Massiah,*[174] *Miranda,*[175] *Escobedo,*[176] *Wade,*[177] *Gilbert,*[178] and *Coleman,*[179] there runs the thread of recognition that counsel is essential to protect the integrity of the fact finding processes at the trial itself.

The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts (1967) commented:

> Counsel is needed to maintain effective and efficient criminal justice. Ours is an adversary system of justice, which depends for its vitality upon vigorous and proper challenges to assertions of governmental authority and accusations of crime. Reliance upon the judge or prosecutor to protect the interests of defendants is an inadequate substitute for the advocacy of conscientious counsel. Limiting the right to

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[172] 18 U.S.C. §3006A.

[173] *Supra,* n. 4.

[174] *Supra,* n. 19.

[175] *Supra,* n. 12.

[176] *Supra,* n. 20.

[177] *Supra,* n. 24.

[178] *Supra,* n. 25.

[179] *Supra,* n. 26.

> counsel 'greatly endangers judicial search for truth'." At pp. 52-53

The jury trial plays a different role in our system. It does not control the presentation of facts, but merely decides whether or not those facts constitute a violation of the law. The same role is played by judges in bench trials. Indeed, thousands of felony cases are tried each year in our courts without juries.[180] No claim can be made that these bench trials per se deny defendants a fair trial. Since *Gideon* there is no doubt that a felony trial without a lawyer (where there has been no waiver), is invalid on its face.

Indeed, the Court has noted "We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that the defendant may never be as fairly treated by a judge as he would be by a jury. *Duncan v. Louisiana.*[181] But in *Gideon*, the Court did hold that every trial of a felony defendant without the benefit of counsel is unfair.

The Supreme Court of Minnesota, commenting on the analogy between counsel and jury trials wrote:

> But even though the two rights derive from the same provisions of the Federal Constitution, they are not of equal significance when it comes to the matter of obtaining a fair trial. It is conceivable that a fair trial may be had before an impartial judge without a jury, but it is hardly conceivable that a person ignorant in the field of law can adequately defend himself without the assistance of counsel. Consequently, we do not consider the cases involving the right to a jury trial controlling this area.[182]

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[180] In the calendar year 1970, in the Courts of Record, the Criminal Courts of Record, Civil and Criminal Courts of Record and Magistrate Courts in Florida, 1,880 cases were disposed of by jury trials, while 7,173 were non-jury cases. See *Sixteenth Annual Report, Judicial Council of Florida,* April 1971, Schedule F, p. 38.

[181] 391 U.S. 145, 148 (1968).

[182] *State v. Borst,* 154 N.W.2d at 894.

Nor has this Court placed the two guarantees on an equal plane. *Gideon* was made retroaction in *Pickelsimer v. Wainwright.*[183] But the right to a jury trial was not made retroactive. *DeStefano v. Woods.*[184]

Finally, it cannot even be flatly stated that the right to a jury trial is inextricably bound to a maximum punishment in excess of six months. In *Baldwin v. New York,*[185] the Court commented:

> Decisions of this Court have looked to both the nature of the offense stated, *District of Columbia v. Colts,* 282 U.S. 63 (1930), as well as of the maximum potential sentence, *Duncan v. Louisiana,* 391 U.S. 145 (1968), in determining whether a particular offense was so serious as to require a jury trial. In this case we decide only that a potential sentence in excess of six-months imprisonment is sufficiently serious of itself to take the offense out of the category of 'petty.'

2. *Even if Baldwin v. New York Presents an Inflexible Rule for Jury Trials, There Is No Authority To Support the Proposition That That Rule Governs All Sixth Amendment Guarantees.*

In addition to a jury trial and the right to counsel, the Sixth Amendment promises an accused (1) the right to a speedy trial; (2) the right to a public trial; (3) the right to know the nature and cause of the accusation; (4) the right to be confronted with witnesses against him; (5) the right to compel favorable witnesses to attend his trial.

It is inconceivable that any court would tolerate the limitations of those rights only to "serious offenses." In *In re Oliver,*[186] the Court made it clear that a public trial

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[183] 373 U.S. 2 (1963).

[184] 392 U.S. 631 (1968).

[185] 399 U.S. 66, 69, n. 6 (1970).

[186] *Supra,* n. 10.

was a basic guarantee to an accused "no matter with what offense he may be charged" and that the right to examine the witnesses against him, to offer testimony, *and to be represented by counsel* are essential to our system of justice.[187] (Emphasis supplied.)

Oliver had been summarily punished for contempt and faced a maximum penalty under Michigan law of sixty days imprisonment and a $100 fine. While the decision was reached on Fourteenth Amendment due process grounds it denotes a clear recognition that some Sixth Amendment rights are so fundamental that they are not subject to quibbling.

With the exception of the jury trial issue, this Court has never limited the application of Sixth Amendment guarantees to "serious offenses." The right to a speedy trial was guaranteed to a state defendant in *Klopfer v. North Carolina.*[188] *Barber v. Page,*[189] and *Pointer v. Texas,*[190] established the right to confront witnesses. *Washington v. Texas,*[191] secured a state defendant's right to compulsory process for obtaining witnesses. The right to an "impartial jury" was recently guaranteed to a misdemeanant. *Groppi v. Wisconsin.*[192] In no way did those decisions intimate that the results hinged upon the gravity or nomenclature of the the offense.[193]

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[187] *Id.*, at 273.

[188] 386 U.S. 213 (1967).

[189] 390 U.S. 719 (1968).

[190] 380 U.S. 400 (1965).

[191] 388 U.S. 14 (1967).

[192] ___U.S.___, 91 S.Ct. 490 (1971).

[193] Indeed, some Sixth Amendment rights have been carried over to non-criminal proceedings as an aspect of due process. Compare the need for confrontation and cross examination set forth in *Greene v. McElroy,* 360 U.S. 474 (1959) and see also, *Goldberg v. Kelly,* 397 U.S. 254 (1970).

3. *The Criminal Justice Act and the Right to Counsel.*

Title 18 U.S.C. §3006A, the Criminal Justice Act of 1964, established a method by which counsel could be compensated for representing indigent defendants in federal courts. In an early draft the Act provided for appointment and compensation of counsel for indigent defendants "in every criminal case in which the defendant appears without counsel."[194]

While the bill was changed later to exclude petty offenses under 18 U.S.C. §1, the change was not meant to limit the constitutional right to counsel, but merely to limit the cases in which counsel would be paid.[195]

The amended §3006A[196] provides for different means of providing representation, but it does not limit the right to counsel either.

Professor Dallin Oaks, upon whose report the Congress relied heavily in passing the new Act[197] wrote:

> The legislative history is clear on the reason for the exclusion of petty offenses from the Criminal Justice Act. The framers of the act did not doubt—

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[194] Report, Appendix II, "The Criminal Justice Bill: Text and Commentary" at 147.

[195] "The bill as passed by the Senate is restricted in scope to felonies and misdemeanors other than petty offenses. The House version of the bill would cover all criminal cases, including petty offenses .... *The constitutional mandate of the Sixth Amendment is without doubt applicable to petty offenses,* but it is the view of the conferees that adequate representation may be afforded defendants in such cases without the need for providing for compensation for counsel. In this way, money appropriated under the act will not be dissipated from the areas of greatest need, cases involving representation for crimes punishable by more than six months imprisonment." Conf. Rept. 1709, U.S. Cong. and Admin. News (88th Cong. 2nd Sess.) 1964 Vol. II, p. 3000. [Emphasis supplied.]

[196] Pub. L. 91-452, 84 Stat. 926, 1970.

[197] Oaks, "Report on the Criminal Justice Act in the Federal District Courts" (1969).

> although prominent courts do—that the Sixth Amendment right to counsel guarantees applied to misdemeanors and petty offenses as well as felonies. Rather, they excluded petty offenses as a matter of priority of expenditures . . .[198]

A close reading of the new act reveals that it was written so that it would encompass the inclusion of petty offenses, once this Court concluded they were within the Sixth Amendment for counsel purposes.[199]

This inclusion was not an oversight. It was made to provide flexibility so as to be able to incorporate what one subcommittee witness called "the progression of the extension of the right to counsel."[200]

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[198]U.S. Congress, Senate Committee on the Judiciary, Hearings Before the Subcommittee on Constitutional Rights, 91st Cong. Vol. 9 (extract from "Report on Criminal Justice Act") p. 328.

[199]18 U.S.C. §3006A(a) Choice of Plan—Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation (1) who is charged with a felony or misdemeanor (other than a petty offense as defined in Section 1 of this title) or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor or with a violation of probation, (2) who is under arrest, when such representation is required by law, (3) who is subject to revocation of parole, in custody as a material witness, or seeking collateral relief, as provided in subsection (g), *or, (4) for whom the Sixth Amendment to the Constitution requires the appointment of counsel,* or for whom, in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel. [Emphasis supplied.]

[200]Hearings Before the Subcommittee on Constitutional Rights, Op. Cit. p. 224, Testimony of Lawrence Speiser, Washington Director of the American Civil Liberties Union.

4. *The Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates and Their Impact on the Right to Counsel.*

On January 27, 1971, Rules of Procedure for the Trial of Minor Offenses Before Magistrates were promulgated by the Court.[201] The dissenting opinion by Mr. Justice Black, states that "by strong negative pregnant they [the rules] suggest there exists no right to jury trial or assigned counsel for 'petty offenses'."[202]

It is interesting to note that the new rules mark a severe departure from Rule 44 of the Federal Rules of Criminal Procedure. The Advisory Committee Note on that rule states:

> Like the original rule the amended rule [44] provides a right to counsel which is broader in two respects that that for which compensation is provided in the Criminal Justice Act of 1964: (1) *The right extends to petty offenses to be tried in the district courts,* and (2) the right extends to defendants unable to obtain counsel for reasons other than financial. [Emphasis supplied.]

If indeed Mr. Justice Black is correct, and the Court did intend to settle the issue of counsel through the new rules, then all is lost for the petitioner.

Hopefully, the rules do not stand for that proposition.

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[201] ___U.S.___, 39 U.S.L.W. 3330.

[202] 39 U.S.L.W. at 3331.

II. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THAT EVERY PERSON FACING INCARCERATION FOR THE COMMISSION OF AN OFFENSE, NO MATTER WHAT ITS DESIGNATION, IS ENTITLED TO BE ADVISED OF HIS RIGHT TO COUNSEL AND HAVE COUNSEL APPOINTED FOR HIM IF HE IS AN INDIGENT.

The issue presented in this case has typically been discussed in the context of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. But a strong equal protection thread runs through the theory of guaranteeing counsel to indigent defendants charged with offenses carrying penalties of less than six months.

Griffin v. Illinois[203] and *Douglas v. California*[204] present compelling equal protection arguments applicable to the counsel issue herein. In *Miranda v. Arizona*[205] the Court commented:

> Denial of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and appeal struck down in *Gideon v. Wainwright*, and *Douglas v. California*.[206]

That view is as valid in this case as it was in *Miranda*.[207] There is no doubt that the petitioner could have brought counsel to his trial if he could have afforded an attorney. Can he be denied counsel at that trial because he is indigent?

Since the right to counsel has been deemed a fundamental right, it cannot be denied to poor persons unless the state can

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[203] *Supra*, n. 11.

[204] 372 U.S. 353 (1963).

[205] *Supra*, n. 12.

[206] 384 U.S. 436 at 472-473.

[207] *Supra*, n. 12.

show a "compelling interest" in that classification. *Shapiro v. Thompson.*[208] The desire to save money is not sufficient to justify the exclusion of indigents from the right to be assisted by a lawyer.[209]

The so called "petty offenses" for which counsel is now denied in Florida have a far greater impact upon the poor than the rich. A conviction which sends a poor man to jail for even a few days has consequences which reach far beyond the loss of liberty. A poor man may well lose his job if he misses work for several days. The loss of a job may result in no income, thence eviction, repossession of furniture, welfare for his family, ad infinitum. The mind boggles at the possibilities which confront a poor man whose job (and life) depend upon his daily appearance at work.[210]

The poor man is not well qualified to conduct his own defense, to cross examine the witnesses against him and to invoke the rules of evidence. He, most of all, requires "the guiding hand of counsel at every step in the proceedings against him." *Powell v. Alabama.*[211]

If the kind of trial a man receives cannot be made to depend upon the amount of money he has, *Griffin v. Illinois,*[212] then *a fortiori* counsel must be provided for poor

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[208] *Supra,* n. 13.

[209] "The saving of welfare costs cannot justify an otherwise invidious classification." *Shapiro v. Thompson, supra,* n. 13 at 633.

[210] Cf. *Baldwin v. N.Y.,* 399 U.S. 66, 73 (1970) and *Marston v. Oliver,* 8 Cr. L. Rptr. 2457 (D.C. E. Va. March 10, 1971).

[211] 287 U.S. at 69. The impact of counsel is apparent from a study made of the City of Miami Municipal Court in 1967. Approximately two-thirds of the defendants with counsel did not go to jail, while over three-fourths of the unrepresented were incarcerated. Menninger, *The Crime of Punishment,* Viking Press, N.Y. 1968 at p. 52-53.

[212] *Supra,* n. 11.

people in cases where a monied man can, and would be represented.[213]

III. EXTENDING THE RIGHT TO COUNSEL TO ALL WHO FACE THE LOSS OF LIBERTY WOULD BENEFIT OUR JUDICIAL SYSTEM.

Although ARGERSINGER faced a maximum punishment of six months incarceration, he urges that the issue presented must be decided in the broader framework of a defendant facing a loss of liberty for any period of time.

For if the court decides this case only in the context of the punishment to which ARGERSINGER was exposed, it will open the flood gates for litigation posing the right to counsel issue in 175-day cases, or 150-day cases and so on until a firm guideline is set.

Such a result is already clear from the plethora of habeas corpus cases brought in Florida seeking to establish a definitive standard. In one jurisdiction a court attempted to set a guide of 90 days or a $500 fine, only to see the city council reduce the maximum penalty to 75 days or a $450 fine in an effort to escape the effect of the decision. Thus the litigation continues.[214]

Clearly no valid consitutional basis exists for holding that the right to counsel is required in a 90-day case, and not necessary in a 75-day or 30-day case. As shown above, no practical purpose is served by augmenting such rules.

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[213]There is some data to support the conclusion that even the rich choose to proceed without counsel in some types of cases. Junker, *The Right to Counsel in Misdemeanor Cases*, 43 Wash. L. Rev. 685, 713-714 (1968). This would also butress the argument for reclassification of offenses according to the actual threat of imprisonment discussed in Part III of this brief.

[214]See, *Wooley v. Consolidated City of Jacksonville*, 433 F.2d 980 (5th Cir. 1970) upholding the district court decision setting a 90-day or $500 fine rule. Then see McRae, *The Administration of Justice in Federal Courts*, 23 U. Fla. L. Rev. No. 2, (at Appendix) (to be published May, 1971).

The reluctance to extend counsel arises from a fear that jaywalkers, sidewalk spitters and overtime parkers will demand lawyers, grinding our judicial system to a halt. *Argersinger v. Hamlin.*[215] Carried to their logical extremes, those fears are sobering, but that argument is actually specious. For it assumes that state and local governments will, of their own paralysis, fail to take actions which would make a constitutional decision workable.

A similar argument was advanced in opposition to *Gideon.*[216] But the states, especially Florida, responded with appropriate legislation and financing to make the *Gideon* mandate a reality.

There are solutions available should the court make the right to counsel applicable to all defendants who face a loss of liberty. In fact some of these solutions may bring about the long needed judicial reform urged by President Nixon in his address to the National Conference on the Judiciary in Williamsburg, Virginia on March 11, 1971. He said:

> What can be done to break the logjam of justice today, to insure the right to a speedy trial—and to enhance respect for the law. We have to find ways to clear the courts of the endless stream of 'victimless' crimes that get in the way of serious consideration of serious crimes. There are more important matters for highly skilled judges and prosecutors than minor traffic offenses, loitering and drunkeness.[217]

The most workable solution would be to reclassify offenses so that the actual threat of punishment would be realistically stated.

Many offenses or crimes do not *actually* carry the threat of jail as punishment. While the ordinance or statute might specify a potential jail sentence, in practice, offenders are

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[215] *Supra*, n. 71.

[216] *Supra*, n. 4.

[217] New York Times, March 12, 1971, p. 18.

not incarcerated for their violations. The best examples are jaywalking, sidewalk spitting and overtime parking. Unless a defendant is a scofflaw, he is not going to be jailed for such offenses. Nor will he be for mere traffic offenses unless he has an extremely bad driving record or has engaged in some type of aggravated driving misconduct.[218]

Once the appropriate legislative body designated the offenses which should actually carry jail potential, computers or court personnel could process those cases into an adversary division of the court where defendant's counsel would be available. The other cases, which might carry only a fine, could be processed in a non-adversary manner, possibly even by non-judicial personnel.

Reclassification can serve a secondary purpose of saving court time and police officers' time.[219]

The reclassification procedure advocated would merely reflect the actual community standards about the seriousness of offenses. It is consistent with what the ABA's Project on Minimum Standards for Criminal Justice, Standards Relating to Providing Defense Services, Section 4.1 (tentative draft, 1967) called for:

[218] For instance, in New York in 1969, 1,803.049 people were convicted of violations including jaywalking and speeding and other traffic infractions. Of this number a total of forty (40) persons were fined and imprisoned, given a suspended sentence, or incarcerated or sent to a reformatory. Source: *Criminal Court of the City of New York Annual Report of 1969*, p. 13, Table 3, line 11. The same table, at line 20, reflects that of the 18,615 convictions of vehicular misdemeanors: driving while intoxicated, reckless driving, leaving the scene of an accident, 332 or 1.8% were incarcerated in some way.

[219] *1970 Annual Report, Metropolitan Court, Dade County, Florida,* reflects at page 35 that 21,489 speeding arrests were made by the Dade County Public Safety Department in the greater Miami area in 1970. 51 of these cases involved accidents. A total of 15,372 persons entered guilty pleas. Assuming that each guilty plea and its disposition took only three minutes, a total of 46,116 minutes, or over ninety-six eight-hour work days, were spent in 1970 by the judges and police officers in Metropolitan Court accepting guilty pleas from speeders.

> Counsel should be provided in all criminal proceedings for offenses punishable by loss of liberty, *except those types of offenses for which such punishment is not likely to be imposed, regardless of their denomination as felonies, misdemeanors or otherwise.* (Emphasis supplied.)[220]

The Sixth and Fourteenth Amendments of the Constitution demand, at the least, the adoption of this standard.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests this Court to hold that persons charged with offenses which may result in a loss of liberty are entitled to be

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[220] Compare the discussion in Kamisar and Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal Policy Observations*, 48 Minn. L. Rev. 1, 62-84 (1963). And see especially, Junker, *The Right to Counsel in Misdemeanor Cases*, 43 Wash. L. Rev. 685, 708-715 (1968). Also, *Misdemeanor's Right to Counsel: Imprisonment Standard*, 21 U. Fla. L. Rev. 421, 424-425 (1969). Note that some jurisdictions have in effect reclassified offenses, limiting the punishment to fines only. *Tate v. Short*, ___U.S.___, 91 S.Ct. 668, 669 n. 2 (1971).

advised of their right to counsel, and to have counsel appointed if they are indigent. The Petitioner requests that the decision of the Florida Supreme Court be reversed and his conviction vacated.

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